

Peets, Toya - ESA

From: Nancy Purvis [nancio@cruzio.com]
Sent: Friday, May 28, 2004 12:36 AM
To: ofccp-public@dol.gov
Subject: Comments



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Thank you for accepting my comments regarding internet applicant recordkeeping.

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May 27, 2004

Joseph DuBray, Jr.
Director, Division of Policy, Planning and Program
OFCCP
Room C-3325
200 Constitution Avenue NW
Washington, D.C. 20210

VIA EMAIL: ofccp-public@dol.gov

Re: Proposal Regarding "Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes"

Dear Mr. DuBray:

I would like to thank the OFCCP for this opportunity to comment on the proposed regulatory changes regarding applicant recordkeeping. I applaud OFCCP for publishing its proposal shortly after EEOC published its proposal so that there is an overlapping time frame between the two related proposals. It is much easier to evaluate potential changes to EEO procedures where information from both agencies is available. I hope that this overlap in comment periods will help both OFCCP and EEOC to evaluate both proposals.

I have been an affirmative action consultant for more than 20 years. I have helped many employers, large and small, develop their affirmative action programs, design their applicant recordkeeping procedures and analyze their hiring practices. Many of my clients are local Silicon Valley, high-tech companies. However, I have worked with employers in a variety of industries inside and outside of California. I applaud parts of the proposal that OFCCP published in the Federal Register of March 29, 2004. But I have strong reservations about other aspects of the proposal, particularly the suggestion that employers should solicit racial and/or ethnic information from job applicants.

Need for Flexibility

As the individuals at OFCCP know, there are many variations in business practices from one employer to another and between industries. In order to create procedures that will work for all employers that contract with the federal government, I feel the overriding emphases must be on flexibility and reasonableness, not on specific, uniform mandates. Apparently OFCCP has adopted the flexible definition of "Internet-related" that EEOC published in the Federal Register on March 4, 2004. Although I cannot be certain of how this definition will be interpreted in the future, it sounds flexible and reasonable to me.

Applicant Definition Should Be Flexible to Be Meaningful

EEOC's proposed definition of applicant for the purpose of recordkeeping under UGESP is far too broad and might result in employers choosing to narrow the breadth of their recruitment processes in order to reduce the number of "applicants" for whom they have to maintain records. To the extent that OFCCP proposes narrowing the recordkeeping requirement to a more reasonable base that promotes more meaningful analysis, I prefer the March 29 proposal. However, even this definition would be better as illustrative, rather than as a hard-and-fast rule. For example, in some cases including applicants who ultimately withdraw their applications would provide the most meaningful analysis of the employer's decision-making process. Also, the proposal suggests that if a qualification is objective, then "a third party, unfamiliar with the employer's operation, would be able to evaluate whether the job seeker possesses the qualification without more information about the employer's judgment." This definition might work for some positions at some companies in some industries. But there are other situations where only someone with sufficient technical knowledge (of the company, of the industry, of the job, etc.) will be able to evaluate whether or not an applicant meets the basic requirements.

Dueling Definitions Are Unworkable

OFCCP has expressly solicited comment on the possibility that employers may face dual recordkeeping standards (*i.e.*, one for Internet applicants and the other for "traditional" applicants). The agency is wise to raise this issue. Multiple standards are not realistic. OFCCP and EEOC seem to be locked in a duel over how to define applicants for recordkeeping purposes. Additionally, both proposals deal only with Internet recruitment. It is not realistic to impose multiple recordkeeping frameworks on employers. Four standards: Internet applicants under UGESP (EEOC) v. other applicants under UGESP (EEOC) v. Internet applicants under Executive Order 11246 v. other applicants under the Executive Order! Very few employers have the specialized staff to deal with such conflicting structures in their recordkeeping systems. I am confident that, if given reasonable discretion to design their systems, employers can implement recordkeeping protocols that promote equal employment opportunity, that allow meaningful analysis of their hiring practices and that would allow the government to investigate complaints of employment discrimination. Employers currently have difficulty maintaining their applicant recordkeeping systems. I am also confident that very few employers (if any) will successfully implement the four-part system that the two agencies, together, seem to be proposing.

Definitions Should Adapt to Employer's Legitimate Procedures

OFCCP and EEOC should not abandon Q&A 15: that the definition of applicant depends on the employer's recruitment and selection procedures. The agencies should remember that many of the employees charged with maintaining applicant records and preparing affirmative action programs will have a variety of duties and will not necessarily be EEO experts. Unrealistic, unattainable requirements will not further the missions of the agencies.

Employers Should Not Be Required To Ask Applicants About Their Race

Employers should be allowed to continue to rely on visual identification to match applicants to the race and national origin codes required by the government. Employers should not be required to ask prospective employees questions that are not job-related. Mandatory

racial/ethnic self-identification is wrong. Visual identification can lead to more meaningful data because it reflects the employer's perception of minority status. Asking individuals their race or national origin is offensive to many people in the United States and abroad. The government (rightly) prosecutes employers that are believed to base selection decisions on race or national origin. It is highly inappropriate for the government to require employers to invite such information from applicants immediately prior to making a selection decision. Visual identification of applicants (and employees) should not be outlawed by the very agencies charged with promoting equal employment opportunity. In any final rule, OFCCP should explicitly state that employers may choose to identify applicants visually.

No Changes Without Representation

If OFCCP (or EEOC) is going to outlaw visual identification of applicants, it should not do so without first consulting the public. The government should not be allowed to sneak something this serious in through a "back door" of ambiguity. To change the rules, the agencies should first publish formal proposals, with introductory summaries that explicitly state that the government is proposing to require employers ask individuals to identify their race and/or national origin. I am unaware of any specific requirement, actual or proposed, that obligates employers to solicit race information from applicants. Yet OFCCP has styled its proposal "Obligation to Solicit Race and Gender Data for Agency Enforcement Purposes." If OFCCP is going to interpret the requirement at 41 CFR 60-1.12 (that contractors collect "where possible, the gender, race, and ethnicity of each applicant") as a requirement for mandatory solicitation of racial information, it should first publish that interpretation. OFCCP should not be allowed to require contractors to solicit race from applicants unless it publishes a final regulation on that specific requirement; and OFCCP should not publish such a final regulation without (1) first proposing a rule so that the interested public can comment and (2) giving due consideration to all comments received.

Thank You For Your Consideration

In conclusion, I urge OFCCP to reconsider some aspects of its proposal. I urge OFCCP to promote diversity and equal opportunity in the labor force by allowing employers to design reasonable applicant recordkeeping systems that are possible for them to implement. Finally, I urge OFCCP to make explicit that employers are not required to elicit race information from applicants.

Respectfully submitted,

Nancy J. Purvis